

August 22, 2011

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW.
Washington, DC 20570

RE: Representation case procedures, RIN 3142-AA08
VIA <http://www.regulations.gov>

Dear Secretary Heltzer,

As scholars and researchers who have studied National Labor Relations Board procedures for several years, and who have published a report on delays in the NLRB election process [submitted for the record], we write to share out views on the proposed amendments to representation case procedures (RIN 3142-AA08).

This comment will cover the following topics:

1. Development of new data on election timing
2. Key findings: votes are excessively delayed and conflict-ridden
3. Proposed procedures would remedy delay without impeding employees' free, informed choice
 - a. Employers share their views on unions on an ongoing basis
 - b. Employees are aware of general management hostility toward unions
 - c. Employers campaign early in an NLRB election effort
 - d. Employer campaigns: saturation of anti-union communications

1. Development of new data on election timing

Dr. John Logan is Director and Professor and Director of Labor and Employment Studies at San Francisco State University and Senior Labor Policy Specialist at the UC Berkeley Labor Center. Professor Logan has published numerous articles documenting the rise of the anti-union consultant industry, and the tactics they advise employers to pursue in order to remain union free. Erin Johansson is Research Director of American Rights at Work and Visiting Scholar at the Institute for Research on Labor and Employment at UC Berkeley. Through her *Eye on the NLRB* blog and numerous American Rights at Work publications, Ms. Johansson has documented the obstacles workers face when attempting to form unions through the NLRB election process. Through years of submitting FOIA requests to the agency, Ms. Johansson has used NLRB data to illustrate pervasive problems in the system of representation and unfair labor practice procedures.

In October 2010, Board member Mark Pearce was quoted at a Suffolk University forum as stating that the NLRB must seek to make the period between the filing of the

representation petition and the vote “as brief as possible.”¹ With this cue that the Board may consider amendments to the election procedure, Professor Logan and Ms. Johansson began research that examined the role of timing during NLRB elections.

2. Key findings: votes are excessively delayed and conflict-ridden

Teaming up with Dr. Ryan Lamare, former faculty of the University of Manchester Business School in Manchester, England, we examined data from fiscal years 2006 to 2009 to better understand the problem of delay. While the NLRB reports that the median time between the petition and election is 39 days, our analysis reveals that a significant percentage of elections lasted far longer because of delays in the hearing process. There is currently no limit on a party’s ability to demand a pre-election hearing on a range of issues, including objecting to the eligibility of the employees in the proposed unit or the scope of the unit. **In cases where a pre-election hearing was held, the election occurred an average of 124 days after the petition was filed.** Though the majority of petitions proceed to an election without a hearing, the fact that the NLRB allows parties the ability to delay cases for an extended period simply by forcing a hearing skews the process in employers’ favor. For example, in order to avoid delays resulting from a hearing, workers often agree to employers’ demands to change the composition of the bargaining unit. Changing the size and composition of the bargaining unit can advantage one party to the detriment of the other (e.g., excluding known union supporters).

With the understanding of the extent to which an employer has the ability to delay a vote by demanding a hearing, we sought to understand how delay might impact illegal campaigning. We examined a database created by Ms. Johansson that manually matched unfair labor practice (ULP) charges with 2003 representation petitions based on several criteria (employer, location, local union, timing). The NLRB has recently improved its data entry system to require agency staff to input RC case information when they enter data for a ULP case that occurs during a representation campaign, but this system is new and was not yet fully implemented when we undertook our research.

The analysis of this matched database yielded the following key finding: **delayed elections expose workers to more illegal employer campaigning.** We conducted a series of multivariate regressions and found the longer the delay between the filing of the petition and election date, the more likely it is that the NLRB will issue complaints charging employers with illegal activity. Controlling for factors like industry, size of the unit, and location, we found a significant causal relationship between the length of election delay (time between the petition filing and the vote) and the number of NLRB complaints issued. The amount of time between the petition filing and election date was the most substantial predictor of NLRB complaint increases.

3. Proposed procedures would remedy delay without impeding free, informed choice

Clearly, delayed votes are a serious impediment to worker free choice. As we detail in our report “New Data: NLRB Process Fails to Ensure a Fair Vote,” our findings “suggest that the NLRB has not lived up to its original mandate in its implementation of the law.

¹ Valliere, Rick. “NLRB Member Pearce Urges Reduction In Time for Holding Representation Elections,” *Daily Labor Report*, BNA. 22 Oct 2010.

To the detriment of workers, the NLRB's election procedures have created inequalities and unfairness over the timing of elections, and allowed the process to be plagued with unfair labor practices."² We support the Board's proposed amendments to the representation procedures because would prevent unnecessary and excessive delays to the vote, and would avoid the serious problems associated with this delay.³ While many of the experts filing comments discuss how these amendments address many of the problems inherent in the current process, we will focus the remainder of our comment on the assertions of those who testified during the July hearing that the proposed amendments would prevent employers from properly campaigning, thus denying employees the ability to make an informed vote. As research on employer communication documents, this is simply an unsubstantiated assertion.

A. Employers share their views on unions on an ongoing basis

Employer communications on unions can happen well ahead of any effort among workers to organize or file a petition for a National Labor Relations Board (NLRB) election. With ample access to employees, employer communications on unions can take the following forms:

1. Incorporating views on unions in an employee's new hire orientation
2. Disseminating company-wide communications about unions
3. Identifying and responding to pre-petition union activity

New hire orientation

When an employer wants to communicate its views on unions to employees, the new hire orientation is a natural place to begin. Some employers outsource their orientation materials to anti-union consultants, who aggressively market their ability to influence employees from the moment they are hired. The anti-union consultant group Labor Relations Services maintains that a key tactic employers should use is "to provide labor education during new hire orientation," concluding that "new hires that are educated with the right amount of information about union authorization cards/petitions and the employer's union-free philosophy are far less likely to sign a union card or petition."⁴

Labor Relations Services advertises on its website that "it is important not to overlook the importance of educating new hires about your union free philosophy."⁵ The consultants maintain that "by including labor relations material in your standard Human Resource orientation information, you can help ensure that employees are well-informed and aware of organizational procedures and philosophies." The group offers to "create custom orientation programs and videos to fit any need, philosophy, and work environment."

² Logan, John, Johansson, Erin and J. Ryan Lamare. "New Data: NLRB Process Fails to Ensure a Fair Vote," Research Brief, Center for Labor Research and Education, University of California, Berkeley. June 2011. http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf

³ The views expressed in this comment and accompanying research brief are those of the authors and do not necessarily represent the Regents of the University of California, the UC Berkeley Institute for Research on Labor and Employment, San Francisco State University, the University of Manchester, or collaborating organizations or funders.

⁴ *American Chronicle*, 2010. "5 Steps to Prevent Union Petitions and Stop Union Card Signing!" <http://www.americanchronicle.com/articles/view/155666>

⁵ Labor Relations Services website, <http://www.proemployer.net/Union-Prevention-Solutions.aspx>, accessed 29 Mar 2011.

Similarly, anti-union consultancy group Projections offers employers a “preventative communications” device known as *IceBreaker*, a custom video that is “designed to be implemented for both existing employees and every new hire.”⁶

Perhaps the most notable example of a company expressing its attitudes toward unions during new hire orientations is Walmart. When Barbara Ehrenreich, author of the best-selling book on low-wage work, *Nickle and Dimed*, worked at Walmart, she learned that new employees are forced to watch an anti-union video, wherein “various associates testify to the ‘essential feeling of family for which Walmart is so well-known,’ leading up to the conclusion that [the workers] don’t need a union.”⁷ The company uses a number of other devices to deliver its anti-union message during new employees’ orientation. For instance, Human Rights Watch notes that new Walmart employees are given cards that provide numbers to call if they are approached by anyone representing a union.⁸

Companywide communication

Employers utilize companywide communications to relay their opinions on unions, and in the case of anti-union employers, to discourage workers from organizing. Professor Logan noted the growth in the 1970s-1990s of corporations issuing explicit statements of their union free philosophy.⁹ Walmart’s “Open Door” policy, which encourages workers to discuss their employment grievances with management, pre-empts a union presence.¹⁰ In response to organizing efforts in several worksites around the country, FedEx Ground sent a companywide letter to all drivers, warning: “a union would not be helpful to our mutual business relationship,” and suggested drivers visit the website of the anti-union organization, the Center for Union Facts.¹¹

Home Depot recently required all employees to attend a mandatory screening of the video entitled, *The Home Depot Associate’s Guide to Labor Unions*. In this video, an “associate” tells employees: “We’re glad you’re part of the team. We hope you never have to deal with a union organizing drive in your facility, but if you do, we hope this video has given you the information you need to stay in control of your valuable signature, and your career.” The video concludes with Marvin Ellison, executive vice president of U.S. stores, declaring, “I hope what you saw and heard gave you some good

⁶ Projections website, http://www.projectionsinc.com/stay_union_free_preventive.html, accessed 29 Mar 2011.

⁷ Ehrenreich, Barbara. 2001. *Nickle and Dimed: On (Not) Getting by in America*. Metropolitan Books, May.

⁸ Human Rights Watch. 2007. *Discounting Rights: Wal-Mart’s Violation of US Workers’ Right to Freedom of Association*. ISBN G1902, April 30.

⁹ John Logan (2006). “The Union Avoidance Industry in the United States,” *British Journal of Industrial Relations*, 44:4 December, 0007–1080 pp. 651–675.

¹⁰ Decision and Order, Wal-Mart Stores, Inc., NLRB Div. of Judges, Case No. 6-CA-31556 (November 12, 2003), G.C. Exh. 13.

¹¹ Johansson, Erin. 2007. *Fed Up with FedEx: How FedEx Ground Tramples Workers’ Rights and Civil Rights*. American Rights at Work, October.

information to consider if you're ever approached by a union and asked to sign a union authorization card or asked to support a union at the Home Depot."¹²

Pre-petition communication

Evidence abounds that employers begin communicating their views on unions as soon as employees begin discussing a possible union effort. Seventy-five percent of employers faced with an NLRB election campaign hire anti-union consultants to help them respond.¹³ Yet employers who are hostile to unions do not wait until employees are ready to hold an election—they hire consultants at the first sign of union activity. These consultants, as Professor Logan observed, argue that: “No company has ever lost an election that wasn’t held.”¹⁴ University of Oregon professor Gordon Lafer outlines two key stages where consultants offer strategies for preventing an election from occurring:¹⁵

1. *Identify and respond to early discussion of unions*
Consultants counsel employers to “conduct an aggressive, intimidating offensive as soon as any workers begin discussing unionization.”¹⁶ They warn supervisors to watch out for any discussion of unions, employees meeting or talking in out-of-the-way places, or even the occurrence of new social bonds.
2. *Prevent the signing of union authorization cards*
Anti-union manuals encourage employers to forcefully campaign to prevent employees from signing enough cards to trigger an election; campaign suggestions include supervisor one-on-one meetings with subordinates, anti-union posters and letters, and mandatory captive audience meetings.¹⁷ Employers create an intimidating anti-union atmosphere so that, “employees are scared into silence before any election can be scheduled.”¹⁸

B. Employees are aware of general management hostility toward unions

Employer efforts to communicate their views on unions, regardless of the presence of a union organizing campaign, are clearly having an impact. Employees who are not represented by unions or engaged in efforts to form unions are generally aware of their employer’s opinion of unions. In *What Workers Want*, Harvard University professor Richard Freeman and University of Wisconsin professor Joel Rogers surveyed non-union employees on whether they thought their coworkers would support forming a union, and if so, why they have not already done so.¹⁹ “Management resistance” to unions was the single largest explanation employees gave for why a union election had not been called in

¹² *The Home Depot Associate’s Guide to Labor Unions*. 2010. Video posted on the Southern Progressive blog, along with documentation that the meetings occurred, accessed 23 May 2011, <http://progressive-southerner.blogspot.com/2011/04/leaked-anti-union-home-depot-video.html>

¹³ Bronfenbrenner, Kate. 2009. *No Holds Barred—The Intensification of Employer Opposition to Organizing*. *Economic Policy Institute Briefing Paper #235*. May 20.

¹⁴ Logan, John. 2002. “Consultants, lawyers, and the ‘union-free’ movement in the USA since the 1970s.” *Industrial Relations Journal*, Vol. 33, Iss. 3, pp. 197-214.

¹⁵ Lafer, 2007

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Freeman, Richard B., and Joel Rogers. 1999 and 2006. *What Workers Want*. Ithaca, NY: ILR Press, an imprint of Cornell University Press. Page 86.

a workplace supportive of unions. In a 2007 analysis of surveys of non-union employees, Professor Freeman concluded that while workers want unions “now more than ever,” they are also “cognizant of management hostility to collective action through unions.”²⁰

C. Employers campaign early in an NLRB election effort

The day that workers file a petition for union representation is not the beginning of the campaign. Before the signing of petitions or authorization cards, employees discuss their working conditions and whether to form a union. They may then decide to contact a union and begin the solicitation of coworkers to sign the petition/cards. Only after all of these steps are completed, and the requisite number of signatures obtained, can employees file a petition with the NLRB.

New research confirms that employers do not wait until workers file a representation petition with the NLRB or until an election is scheduled to start discussing their views on unions, often stepping over the line into illegal behaviors. A recent study from Columbia University professor Dorian Warren and Cornell University researcher Kate Bronfenbrenner found that employees file serious unfair labor practice charges with the NLRB alleging illegal employer tactics well before any petition for an NLRB election has been filed: “30 percent of serious violations occurred 30 days before the petition was filed and 47 percent of all serious allegations occurred before the petition was filed.”²¹ Ultimately, they concluded, **“some of the most egregious employer opposition starts even before the union has filed the petition.”**

Our data also reveal evidence of early employer campaigning. If workers believe their employer is engaging in illegal activity, they can choose to file an unfair labor practice charge that blocks an election from proceeding. These allegations are often made early in the election process, suggesting that employers are responding quickly with anti-union tactics. Between fiscal years 2006 and 2009, six percent of representation petitions filed were blocked from proceeding due to unfair labor practice charges alleging employer violations.²² Though this practice is uncommon, the timing of the charges is informative. Of these blocked elections, **39 percent were blocked by charges filed within 10 days of the petition being filed.** Thus, these cases demonstrate that anti-union tactics are taking place within days of a representation petition being filed.

Finally, the timing of petition withdrawal provides insight into the timing of employer communications. It is common practice for workers to file a petition with a solid majority in support of the union, thus the decision to withdraw a petition likely represents employees’ reaction to employer anti-union campaigning. Stanford Business School professor John-Paul Ferguson reviewed data on representation petitions filed between

²⁰ Freeman, Richard B. 2007. *Do Workers Still Want Unions? More than Ever*. Economic Policy Institute, briefing paper #182, February 22.

²¹ Bronfenbrenner, Kate, and Dorian Warren. 2011. *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence*. Working Paper Series 2011.01, Institute for Social and Economic Research and Policy, Columbia University, <http://academiccommons.columbia.edu/catalog/ac:135141>

²² We obtained data on all RC elections blocked between fiscal years 2006 and 2009 through a FOIA request fulfilled by the NLRB 30 Sept. 2010.

1999 and 2004. He found that of the 7,315 petition cases that are withdrawn prior to a vote, **nearly one quarter are withdrawn within 10 days of the petition filing, and in half of these cases, the petition is withdrawn within 20 days of filing.**²³ The withdrawal of petitions within days of filing suggests strongly that employers are campaigning either before or right after the petition is filed.

Below are recent examples of early employer campaigning:

*Latino Express School Bus Campaign*²⁴

Latino Express school bus drivers in Chicago, Illinois filed a petition for an NLRB election on January 18, 2011, yet the **employer initiated its anti-union campaign before the petition was filed.** Prior to the petition, the company fired the two most ardent union supporters shortly after early meetings were held to discuss the formation of a union. Additionally, the company held a recorded captive audience meeting, gave a 50 cent raise to all employees, and held one-on-one meetings with employees before the petition was filed.

*Dapper School Bus Campaign*²⁵

Dapper School Bus drivers in Trenton, New Jersey filed a petition for election on February 24, 2011, though **the employer began its anti-union campaign fully four months before the filing of the petition.** The Teamsters union filed 30 unfair labor practice charges against the employer, alleging that tactics employed prior to the filing of the petition included threats, interrogations, firings, surveillance, and coercion. Some of the alleged violations included changing longstanding company policies regarding employee communications, removing employees' public transportation access, and intimidating pro-union employees.

D. Employer campaigns: saturation of anti-union communications

Several studies of NLRB election campaigns reveal the general nature of employer anti-union tactics. According to Cornell researcher Kate Bronfenbrenner, when faced with an NLRB election:²⁶

- 89% of employers held captive audience meetings (an average of 10.4 meetings)
- 77% of employers held supervisor one-on-one meetings
- 74% of employers distributed anti-union leaflets (an average of 16 leaflets)
- 70% of employers mailed anti-union letters (an average of 6.5 letters)

²³ Data obtained through email communications between Erin Johansson and John-Paul Ferguson. For more information on Ferguson's dataset and additional findings, see: John-Paul Ferguson (October 2008). "The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004," *Industrial and Labor Relations Review*, Vol. 62, No. 1.

²⁴ Campaign information provided to Erin Johansson by Elizabeth Gonzales, Teamsters Local 777 in emails dated 29 Mar 2011.

²⁵ Information provided to Erin Johansson by Felicia Walker of the Teamsters in emails dated 29 March 2011.

²⁶ Kate Bronfenbrenner (May 2009). *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Washington, D.C., Economic Policy Institute and American Rights at Work Education Fund.

The fact that most employers engage in this saturation of anti-union communication is a result of the widespread use of union avoidance consultants—an industry that has grown precipitously since the 1970s.²⁷ Major consultant firm Jackson Lewis advises employers to do the following in just the first four weeks the campaign: send nine letters to employees' homes, four notices on bulletin boards, six leaflets passed out to employees in the workplace, three anti-union speeches in mandatory all staff meetings, one vote demonstration, and five days of small group meetings where immediate supervisors tell employees that unions are bad.²⁸ Another consultant encourages a “‘Vote No’ saturation carnival,” which involved all supervisors wearing “Vote No” buttons, shirts, etc, and distributing them to all employees.²⁹ These strategies do not appear to involve the introduction of new information for employees to make an informed vote, but rather a repetition of core messages through different means of communication.

4. Conclusion

Delayed votes are a serious impediment to employees as they exercise their right to form unions. Our data reveals how easy it is for an employer to force a hearing and delay the vote by months. With every day of delay, there is a greater likelihood of unfair labor practices. The Board's proposed amendments to the election process would prevent much of the unnecessary delay that creates conflict in the workplace. Those opposing these proposed changes assert they would hinder an employer from conducting a proper campaign to fully inform employees of their views on unions. Yet as we addressed in this comment, a shorter vote period would not deny employees the opportunity to hear their employer's views on unions. Employers begin campaigning prior to the petition being filed, and often use a high volume of communications. The proposed rule represents a positive step toward creating a more fair and efficient election process.

Thank you for allowing us the opportunity to comment on this important matter.

Sincerely,

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²⁷ Logan, 2006.

²⁸ Jackson Lewis advise cited in Gordon Lafer (2007). *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Election*. Washington, DC: American Rights at Work

²⁹ Ibid.

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